106

Supreme Court, U.S.
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No. 08-

In The Supreme Court of the United States

DR. ROLAND ONAWOLA

Petitioner

v.

JOHNS HOPKINS UNIVERSITY, JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES, PRESIDENT WILLIAM BRODY, DEAN MICHAEL KLAGG, FORMER DEAN ALFRED SOMERS, DR. JONATHAN SAMET, DR. KATHY HELZLSOUER, DR. GEORGE COMSTOCK, DR. ROSA CRUM, DR. GENEVIEVE MATANOSKI, DR. TAHA TAHA, DR. LISA JACOBSON, MS. FRANCES BURMAN

Respondents

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does res judicata bar a *42 U.S.C. Section 1981* claim, and another related claim, even though the acts upon which they are based did not occur until two months after the prior related case was decided?

2. Does res judicata bar claims that have never been litigated and decided by a Court?

3. Does res judicata bar claims in a later suit asserting legal theories that are different from those asserted in an earlier related suit?

4. In deciding a res judicata case, does a District Court not commit reversible error by applying a wrong standard, instead of following the Supreme Court's standards, as instructed in *Arizona v. California, 530 U.S. 392 (2000)*? "The general rule is that issue preclusion attaches only when an issue is

actually litigated and determined by a valid and final judgment."

5. Does a District Court not commit reversible error by refusing to follow the Supreme Court's clear and unequivocal instructions on deciding res judicata cases, as pronounced by this Court in *United States v. International Building Co., 345 U.S. 502, 505 (1953)*? "[T]he inquiry **must always be** as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (emphasis added).

6. Does a District Court not commit reversible error by refusing to place the burden on defendants to show that the claims they wish to preclude were litigated and actually previously adjudicated, as this Court held in *Dowling v. United States, 493 U.S. 342, 350-351 (1990)*? "The Courts of Appeals have

unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding."

7. Does an Appeals Court not violate an Appellant's *14th Amendment due process rights* by withholding critical information needed for filing a petition for rehearing en banc, and essentially reducing the 14 days allowed for filing to 5 days?

PARTIES TO THE PROCEEDING

Petitioner is Dr. Roland Onawola, who was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents are: Johns Hopkins University, Johns Hopkins University Board Of Trustees, President William Brody, Dean Michael Klagg, Former Dean Alfred Sommers, Dr. Jonathan Samet, Dr. Kathy Helzlsouer, Dr. George Comstock, Dr. Rosa Crum, Dr. Genevieve Matanoski, Dr. Taha Taha, Dr. Lisa Jacobson, Ms. Frances Burman. Respondents were also Defendants in the District Court and Appellees in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iv
TABLE OF AUTHORITIES	ix
CITATION OF OPINIONS BELOW	1
JURISDICTION	2
STATUTES OR OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. This Case Satisfies Four Criteria Or Sub-Criteria Of Rule 10 For Granting Review Of Certiorari	6
II. The United States Supreme Court Has, For More Than 130 Years, Consistently Held That Res Judicata Does Not Bar Claims That Have Never Been Litigated And Decided By A Court	7

III. This Court's Numerous Opinions Clearly Hold That Res Judicata Does Not Bar Claims Based On Unlawful Acts That Had Not Been Committed When The Previous Case Was Decided 10

IV. The Supreme Court Issued Clear And Unequivocal Instructions To Courts On Deciding Res Judicata Cases In *International Building Co., 345 U.S. 502, 505 (1953),* But The Fourth Circuit And District Court Refused To Follow The Instructions In Instant Case 11

V. The Rulings Of Many Circuits Are Consistent With The Supreme Court's Rulings That Res Judicata Does Not Bar Claims That Were Not Decided In The Prior Case Or That Did Not Exist When The Case Was Decided ... 14

VI. The Supreme Court Holds That Res Judicata Does Not Bar Claims In A Later Suit Asserting Legal Theories That Are Different From Those Asserted In An Earlier Suit 19

VII. None Of The Claims In This Suit Is Precluded By Res Judicata 22

VIII. The District Court Committed Very Serious Reversible Errors 25

IX. The 4th Circuit Panel Violated Petitioner's *14th Amendment Rights To Due Process* By Essentially Reducing The 14 Days For Filing Petition For Rehearing To 5 26

CONCLUSION 27

APPENDIX

A. Roland Onawola, Plaintiff v. Johns Hop-Hopkins University et al., Defendants, Civil Action No. AMD 05-1924, U.S. District Court for the District of Maryland, *412 F. Supp. 2d 529; 2006 U.S. Dist., Feb 6, 2006,* Filed, Opinion by Judge: Andre M. Davis, District Judge ..... App. 1

B. Dr. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins University et al., Defendants-Appellees, No. 06-1294, U.S. Court of Appeals for the 4th Circuit, *221 Fed Appx 211; 2007, March 13, 2007,* Decided, Judges: King and Shedd, Circuit Judges, and Hamilton, Senior Circuit Judge.... App. 15

C. Roland Onawola, Plaintiff v. Johns Hopkins University et al., Defendants, Civil

Action No. AMD 07-870, U.S. District Court for the District of Maryland, Memorandum Opinion, Filed: September 24, 2007, Andre M. Davis, District Judge ..... App. 17

D. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins Univ., et al., Defendants-Appellees, No. 07-2073 (1:07-cv-00870), U.S. Court of Appeals for the 4th Circuit, Judgment Filed May 5, 2008, Patricia S. Connor, Clerk ..... App. 20

E. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins Univ., et al., Defendants-Appellees, No. 07-2073 (1:07-cv-00870), U.S. Court of Appeals for the 4th Circuit, Opinion Decided May 5, 2008 Before: King and Shedd, Circuit Judges, and Hamilton, Senior Circuit Judge ..... App. 21

F. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins Univ., et al., Defendants-Appellees, No. 07-2073 (1:07-cv-00870), U.S. Court of Appeals for the 4th Circuit, Order refusing extension of time to file petition for rehearing, Filed May 12, 2008, Patricia S. Connor, Clerk, for the Court – by direction ..... App. 23

TABLE OF AUTHORITIES

Page

Supreme Court Cases

Archer et. ux. v. Warner 538 U.S. 314 (2003) 8

Arizona v. California, 530 U.S. 392 (2000) .....
.....7, 8, 9, 20, 22, 25

Blonder-Tongue Labs., Inc., v. Univ. of Illinois
Foundation, 402 U.S. 313 (1971) 12

Commissioner of Internal Revenue v. Sunnen,
333 U.S. 591 (1948) 8

Cooper v. Federal Reserve Bank of Richmond,
467 U.S. 867 (1984), 104 S.Ct. 2794, 81 L.
Ed. 2d 718 .....8, 9, 21

Cooter & Gell v. Hartmarx Corp., 496 U.S.
384, 405 (1990) 25

Cromwell v. County of Sac., 94 U.S. 351,
353 (1877) 8, 9

Dowling v. United States, 493 U.S. 342 (1990)
.....8, 12, 14, 23, 24, 25

EEOC v. Waffle House, Inc. 534 U.S. 279 (2002) 8

Jones v. Bock, 549 U.S. 199, 204 (2007) 12

Lawlor v. National Screen Service, 349 U.S. 322 (1955) 8

Mercoid Corp. v. Mid-Continental Inv. Co., 320 U.S. 661 (1944) 8

Richards v. Jefferson County, 517 U.S. 793, 797 (1996) 13

Schlup v. Delo, 513 U.S. 298, 333 (1995) 25

Semtek International Inc. v. Lockheed Martin Corp. 531 U.S. 497 (2001) 8

Taylor v. Sturgell 128 S.Ct. 2161 (2008) 12, 13, 27

United States v. International Building Co., 345 U.S. 502 (1953) 8, 9, 11, 13, 23, 25

Circuit Cases

Frank v. Home Depot, 481 F. Supp 2d 439, 442 (DMd. 2007).....18

Harnett v. Billman, 800 F.2d 1308, 1314 (4th Cir. 1986) 13, 23, 24

Herrmann v. Cencom Cable Associates, Inc., 999 F. 2d 223 (7th Cir. 1993) 20

In re Varat Enters., Inc., 81 F.3d 1310, 1315 (4th Cir. 1996) 13

Keith v Aldridge, 900 F. 2d 736, 740. (4th Cir. 1990) 18

Kline v. Rankin, 489 F. 2d 387 (5th Cir. 1974) 21

Los Angeles Branch NAACP v. Los Angeles United School District, 750 F. 2d 731, 739 (9th Cir. 1984), cert. denied 474 U.S. 919, 88 L. Ed 2d 256, 196 S.Ct. 247 (1985) 17

Mahroom v. Hook, 563 F. 2d 1369, 1377 (9th Cir. 1977) 16

Manning v. City of Aubum, 953 F. 2d 1355, 1358 (11th Cir. 1992) 17

Moore et al. v. National Pension Fund for Hospital and Health Care Employees, et al. Nos. 97-7584(L), 97-7646 17

Peugeot Motors of America v. Auto Distributors, 892 F. 2d 355, 359 (4th Cir. 1989) 18

Pleming V. Universal-Rundle Corp. 142 F. 3d 1354 (11th Cir. 1998) 15, 16, 17

Spiegel v. Continental Ill. National Bank, 790 F. 2d 638, 644-6 (7th Cir. 1985), cert. denied 479 U.S. 987, 93 L. Ed 2d 582, 107 S.Ct. 579 (1986) 17

Stevenson v. Int'l Paper Co., 516 F. 2d 103, 111 (5th Cir. 1975) 16

Unger v. Consolidated Foods Corp. 657 F. 2d 909, 911 (7th Cir. 1981) 21

United States v. Head, 697 F.2d 1200, 1208-9 (4th Cir. 1988) 23

United States v. Woods, 484 F. 2d 127, 138 (4th Cir. 1973) 17

U.S. v. Baugus, 761 F.2d 506, 508 (CA8 1985) 12

U.S. v. Citron, 853 F.2d 1055, 1058 (CA2 1988) 12

U.S. v. Gentile, 816 F.2d 1157, 1162 (CA7 1987) 12

U.S. v. Hewitt, 663 F.2d 1381, 1387 (CA11 1981) 12

U.S. v. Lasky, 600 F.2d 765, 769 (CA9), cert. denied, 444 U.S. 979 (1979) 12

U.S. v. Mock, 640 F.2d 629, 631, n. 1
(CA5[493 U.S. 342, 351] 1981) 12

U.S. v. Ragins, 840 F.2d 1184, 1194
(CA4 1988) 12, 23

Wu v Thomas, 863 F. 2d 1543, 1548-9
(11th Cir. 1989) 16

Young-Henderson v. Spartanburg Area
Mental Health Ctr. et al., 945 F. 2d 770
(4th Cir. 1991) 18, 19

Other Authorities

18 Wright, A. Miller and Cooper, Federal
Practice and Procedure, §4405 §4409
(1981) 13, 18

CITATION OF OPINIONS BELOW

(1) Roland Onawola, Plaintiff v. Johns Hopkins et al., Defendants, Civil Action No. AMD 05-1924, U.S. District Court for the District of Maryland, *412 F. Supp. 2d 529; 2006* U.S. Dist., Feb 6, 2006, Filed, Opinion by Judge: Andre M. Davis, District Judge

(2) Dr. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins et al., Defendants-Appellees, No. 06-1294, U.S. Court of Appeals for the 4th Circuit, *221 Fed Appx 211; 2007, March 13, 2007,* Decided, Judges: King and Shedd, Circuit Judges, and Hamilton, Senior Circuit Judge

(3) Roland Onawola, Plaintiff v. Johns Hopkins et al., Defendants, Civil Action No. AMD 07-870, U.S. District Court for the District of Maryland, Filed: September 24, 2007, Andre M. Davis, District Judge

(4) Dr. Roland Onawola, Plaintiff-Appellant v. Johns Hopkins et al., Defendants-Appellees, No. 07-2073, (Unpublished Opinion) U.S. Court of Appeals for the 4th Circuit, Decided: May 5, 2008, Judges: King and Shedd, Circuit Judges, and Hamilton, Senior Circuit Judge

JURISDICTION

On May 5, 2008, a 4th Circuit Panel affirmed the dismissal of Petitioner's second case. The District Court had jurisdiction based on diversity of citizenship, and the Supreme Court has jurisdiction pursuant to *28 U.S.C. Section 1254(1).*

STATUTES OR OTHER PROVISIONS INVOLVED

42 U.S.C. Section 1981

42 U.S.C. Section 1981, as amended by the *Civil Rights Act of 1991*, states, inter alia:

"(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

Fourteenth Amendment Section 1 **(Relevant Parts)**

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In September, 1991, Petitioner, Dr. Roland Onawola, a Black man of Nigerian origin enrolled as a doctor of science (Sc.D.) candidate in the Department of Epidemiology at the Bloomberg School of Public Health, Johns Hopkins University.

The records show that soon after that, his then academic advisor, Respondent Genevieve Matanoski began to subject him to abusive treatments, such as refusing to meet with Petitioner on numerous pre-scheduled occasions; refusing to show up at meetings that were critically important for Petitioner's academic progress; refusing to give him Research Assistantship throughout the six years she was his advisor, while giving to every similarly-situated white-skinned student.

Due to the financial deprivation, Petitioner took a one-year leave of absence, which is automatically allowed by University regulations. On returning,

Respondent Matanoski bluntly refused to take him back, and insisted he had to leave the University. Traumatized and confused, Petitioner went to report to Respondent Samet, Chairman of the Department. Samet took over as Petitioner's advisor, and continued the abusive treatment practiced by Matanoski even on a much grander scale.

Samet repeatedly tried to sabotage Petitioner's Sc.D. research, e.g., by fabricating the blatant untruth that National Institutes of Health (NIH) never allows its money to be used for financial compensation for study subjects, and bluntly refusing to let Petitioner accept the money being offered by the NIH for that exact purpose. Respondent Samet ostracized Petitioner by (a) removing his name from the Departmental Directory, while a similarly situated White student still had her name listed; (b) refusing him access to the Epidemiology Students' room, belonging to all students; (c) abruptly canceling his hard-earned scholarship; (d) engineering a hold-up of Petitioner's Institutional Review Board (IRB) review for 8 months when it normally takes only 2 months.

Respondent Samet also led other Respondents, Helzlsouer, Comstock, and Crum in relentless efforts to sabotage Petitioner's Sc.D. research, e.g., by fraudulently claiming that depression causes breast cancer, which is pure scientific fraud. The four Respondents then insisted that Petitioner, who is not a psychiatrist or even a physician had to diagnose

depression in order to carry out his breast cancer thesis research.

In July 2005, Petitioner filed a suit in the District Court. The District Court had jurisdiction based on diversity of citizenship. In October, 2005, the District Court dismissed the case without prejudice. In February 2006, the amended Complaint was dismissed with prejudice. After the 4th Circuit Panel affirmed in March 2007, petition for en banc hearing was passively denied in May, 2007 for lack of a roll call.

Meanwhile, while the appeal was pending, Respondents unlawfully dismissed Petitioner. In April 2007, Petitioner filed the current suit for fraudulent misrepresentation, breach of fiduciary duties, unlawful dismissal, and Section 1981 discrimination with respect to his unlawful dismissal. Respondents filed a motion to dismiss on the basis of res judicata. Even though none of the current claims were submitted or litigated or decided in the prior case, inspite of Petitioner's vehement opposition, the District Court refused to comply with the Supreme Court's standards and instructions to Courts on deciding res judicata cases, and dismissed the case as precluded by res judicata.

Petitioner took a timely appeal, but a Panel of the 4th Circuit affirmed on May 5, 2008. Petitioner's petition for en banc hearing was refused as untimely even though it was FedExed on the due date for next

day delivery, as usually acceptable for most court submissions.

Petitioner now files this timely Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

This Case Satisfies Four Criteria Or Sub-Criteria Of Rule 10 For Granting Review Of Certiorari

1. The Court of Appeals at the 4th Circuit has decided very important federal questions on res judicata decisions by a federal Court, and *42 U.S.C. Section 1981* decision as it relates to res judicata in a way that seriously conflicts with many relevant decisions of this Court – *Rule 10(c).*
2. The 4th Circuit's decisions on these important federal questions and it's other decisions on res judicata in this case seriously conflict with the decisions of most other Circuits – *Rule 10(a)* sub-criterion.
3. The 4th Circuit's decisions have "so far departed from the accepted and usual course of judicial proceedings as to call for

an exercise of this Court's supervisory power." *Rule 10(a)* sub-criterion.

4. By it's affirmance of the District Court's rulings, the 4th Circuit sanctioned decisions by the lower court that are "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." *Rule 10(a)* sub-criterion.

II.

The United States Supreme Court Has, For More Than 130 Years, Consistently Held That Res Judicata Does Not Bar Claims That Have Never Been Litigated And Decided By A Court

The 4th Circuit affirmed the District Court's ruling that res judicata bars Petitioner's Section 1981 claim, and other claims, none of which was litigated and decided in the previous case. That decision by the 4th Circuit very seriously conflicts with the Supreme Court's long history of holding that res judicata only bars claims that were litigated and actually decided in a previous case.

The Supreme Court, in 2000, held that: "The general rule is that issue preclusion attaches only when an issue is actually litigated and determined by a valid and final judgment." *Arizona v. California, 530 U.S. 392 (2000).*

This Court has, for more than one century, consistently held that same position that a claim in a second case is not res judicata unless it has previously been actually decided by a Court. *Archer et. ux. v. Warner 538 U.S. 314 (2003); EEOC v. Waffle House, Inc. 534 U.S. 279 (2002); Semtek International Inc v. Lockheed Martin Corp. 531 U.S. 497 (2001); Arizona v. California, 530 U.S. 392 (2000); Dowling v. United States, 493 U.S. 342 (1990); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); Lawlor v. National Screen Service, 349 U.S. 322 (1955); U.S. v. International Building Co., 345 U.S. 502 (1953); Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948); Mercoid Corp v. Mid-Continental Inv Co., 320 U.S. 661 (1944); Cromwell v. County of Sac, 94 U.S. 351, 353 (1877).*

In the *Arizona (2000)* decision, quoted above, the Court also noted: "This Court's decision in *United States v. International Building Co., 345 U.S. 502 (1953),* is illustrative."

In that 1953 decision, the Court held:

> "[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." *International Building Co. (1953), 504-505,*

quoting Cromwell v. County of Sac, 94 U.S. 352-353 (1877).

Thus, the Supreme Court's interpretation of res judicata held in *Arizona* (in the year 2000), relied on *International Building Co. (1953),* which, in turn, relied on *Cromwell (1877).* This string of cases, spanning more than one century, clearly provides proof that this interpretation of res judicata has endured the test of time for at least 130 years.

Through these important precedents, the Court has made it very clear that res judicata does not bar claims that were not litigated and decided in the prior case.

Further, this Court has held that a decided claim has to have been framed as a distinct claim (count), and litigated, and discussed by the court, and actually decided by the court in the prior case.

For instance, in *Cooper,* the Court decided that, although the issue of racial discrimination against individual plaintiffs was framed as a distinct claim (count), litigated, and discussed by the District Court, it was not barred by res judicata because the Court "pointedly refused to decide the individual claims." *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), 104 S.Ct. 2794, 81 L. Ed. 2d 718.*

The lower Court's rulings are in serious conflict with this Supreme Court's standard, because none of the claims in the current case has ever been framed as a distinct claim (count), and litigated, and

discussed by the court, and actually decided by the court in the prior case.

The 4th Circuit and the District Court are required to comply with the Supreme Court's standards. The Panel and District Court failed to do so, and should be REVERSED by this Court.

III.

This Court's Numerous Opinions Clearly Hold That Res Judicata Does Not Bar Claims Based On Unlawful Acts That Had Not Been Committed When The Previous Case Was Decided

The 4th Circuit affirmed the District Court's ruling that res judicata bars Petitioner's claims based on racially discriminatory dismissal occurring two months after the prior case was decided. That decision by the 4th Circuit very seriously conflicts with this Court's long history of holding otherwise.

Counts III and IV of Petitioner's Complaint, are based on his illegal dismissal by Respondents. These claims have never been litigated and decided, and could not possibly have been litigated, and decided, because the claims simply did not exist during the first case. The unlawful acts were perpetrated two months after the previous case was decided. The rights to sue on these claims were not acquired by Petitioner until after the previous case was final.

From this Court's important precedents, discussed above, the Court has made it very clear that res judicata does not bar claims that were not litigated and decided in the prior case, and that certainly means that res judicata does not bar claims that did not even exist at the time the prior case was decided, as is the situation with Petitioner's Counts III and IV.

This Supreme Court standard has been seriously contradicted by the 4th Circuit's and District Court's decisions.

IV.

The Supreme Court Issued Clear And Unequivocal Instructions To Courts On Deciding Res Judicata Cases, In *International Building Co., 345 U.S. 502, 505 (1953)*, But The Fourth Circuit And District Court Refused To Follow The Instructions In Instant Case

Over 50 years ago, the Supreme Court issued the following instructions to all Courts: "[T]he inquiry **must always be** as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." *International Building Co., id., p. 505 (1953)* (emphasis added).

The Court was so emphatic that it did not use any of the usual imperative terms, such as "may", "will" or "shall", but, instead, employed the most emphatic imperative, "must", signifying a command.

Ever since the Court made this pronouncement, it has been, and still is, the law of the land. That I am correct in making this assertion is completely born out by the fact that ALL U.S. Circuits have unanimously adhered to these Supreme Court's instructions. The Court itself aptly proclaimed: "The Courts of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling (1990), id., pp. 350-351.* The Court cited *U.S. v. Ragins, 840 F.2d 1184, 1194 (CA4 1988); U.S. v. Citron, 853 F.2d 1055, 1058 (CA2 1988); U.S. v. Gentile, 816 F.2d 1157, 1162 (CA7 1987); U.S. v. Baugus, 761 F.2d 506, 508 (CA8 1985); U.S. v. Mock, 640 F.2d 629, 631, n. 1 (CA5[493 U.S. 342, 351] 1981); U.S. v. Hewitt, 663 F.2d 1381, 1387 (CA11 1981); U.S. v. Lasky, 600 F.2d 765, 769 (CA9), cert. denied, 444 U.S. 979 (1979).*

The Court has very recently reasserted this ruling by declaring, "Claim preclusion, like issue preclusion, is an affirmative defense ..... [I]t is incumbent on the defendant to plead and prove such a defense[.]" *Taylor v. Sturgell et al., 128 S.Ct. 2161, 2179-2180 (2008), citing Jones v. Bock, 549 U.S. 199, 204 (2007), Blonder-Tongue Labs., Inc., v. Univ. of Illinois*

Foundation, 402 U.S. 313 at 350 (1971), and 18 Wright & Miller §4405, p. 83 ("[A] party asserting preclusion must carry the burden of establishing all necessary elements.").

These key standards and instructions by the Supreme Court certainly invalidate the only two authorities cited by the District Court to support its decision: *In re Varat Enters., Inc., 81 F.3d 1310, 1315 (4th Cir. 1996), and Harnett v. Bill-man, 800 F.2d 1308, 1314 (4th Cir. 1986).*

This Court is the final arbiter of our laws, including laws regarding res judicata, of which the Court has very recently asserted "this Court has ultimate authority to determine and declare." *Taylor v. Sturgell et al., 128 S.Ct. 2161, 2171 (2008), citing Richards v. Jefferson County, 517 U.S. 793, 797 (1996).*

Amazingly, both the 4th Circuit Panel and the District Court refused to follow or even acknowledge these Supreme Court's instructions even though these and many other Supreme Court decisions were cited to both. (See Appellant Inf. Br. pp. 2-4).

Thus, the District Court seriously erred by failing to make the inquiry mandated by the Supreme Court to ensure that the claims in the current case were actually litigated and determined in the prior case. *International Building Co., id.* There was no such inquiry, only conclusory statements, which are not supported by the facts or the laws.

The District Court also erred by failing to put the burden on the Respondents to prove that the claims in the current case were actually litigated and decided in the prior case, as required by the Supreme Court. Dowling, id. The Respondents did not even attempt to provide such proof. All they put forward were nebulous, conclusory statements.

The Panel's and District Court's rulings completely failed to comply with the Supreme Court's clear and unequivocal instructions to courts on deciding res judicata cases.

The Panel seriously erred by failing to overturn the District Court's ruling for not following these Supreme Court-mandated instructions, and should be REVERSED.

V.

The Rulings Of Many Circuits Are Consistent With The Supreme Court's Rulings That Res Judicata Does Not Bar Claims That Were Not Decided In The Prior Case Or That Did Not Exist When The Case Was Decided

The Panel's and District Court's rulings are also directly in conflict with the rulings of Circuits which have been consistent with this Court's standards, i.e., claims that had never been previously decided, and claims based on rights to sue that are acquired after a suit was filed are not barred by res judicata.

For res judicata to preclude a claim, it must have been submitted as a claim, and litigated, and a judge must have discussed the claim and actually rendered a decision on it, in the prior case. However, mere isolated references by a court is not adjudication of "unpled and unasserted claim". *Pleming v. Universal-Rundle Corp. 142 F. 3d 1354 (11th Cir. 1998).*

The 11th Circuit ruled that the second suit was not barred by res judicata because the events referred to in the prior case were not independent claims in the prior case, and the court did not render a decision on those events. *Pleming V. Universal-Rundle Corp. 142 F. 3d 1354 (11th Cir. 1998)*

> "We cannot accept [defendant's] contention that [plaintiff] litigated her claims arising out of [later incidents] simply by offering the incidents as evidence of pretext in a distinct employment decision. [...] [T]o the extent that [plaintiff] raised the [later incidents] in the first litigation, she did not "actually litigate" the question of whether those incidents would themselves constitute employment discrimination." *Pleming, id.*

The 11th Circuit, in *Pleming* further held that:

> "[A] plaintiff's interjection of unpled matters into a supplementary pretrial statement and introduction of evidence on those matters as "background material" to distinct legal claims does not bar the subsequent litigation of the

> plaintiff's independent claims arising out of those matters. [...] [A] judgment against the plaintiff on prior claims of gender discrimination did not collaterally estop a subsequent claim for retaliation, even though the testimony offered in the first trial "touched on" the defendant's retaliatory action." *Pleming, id. Citing Stevenson v. International Paper Co., 516 F. 2d 103, 111 (5th Cir. 1975).*

The mere fact that an act involved in a second case is similar to one in the first case does not bar the second case under res judicata. In the instant case, acts in the second case, that appear similar to those in the first case, actually constitute independent claims only in the second case. For instance, the *Section 1981* claim is an independent claim of racial discrimination in the making and enforcement of a contract, related to the illegal dismissal of Plaintiff by Defendants. See *Mahroom v. Hook, 563 F. 2d 1369, 1377 (9th Cir. 1977)* "(holding that identical allegations of discrimination in connection with a hiring decision two years after the subject of an earlier proceeding constituted a separate cause of action.)"; *Wu v Thomas, 863 F. 2d 1543, 1548-9 (11th Cir. 1989).* "(inclusion of a testimony in a prior action that touched on the substance of second cause of action for retaliation could not implicitly amend the complaint in the prior action)."

The 2nd Circuit held that a second case on retirement benefit issues was not barred because "The district court's opinion did not discuss this issue, and we vacate." *Moore et al v. National Pension Fund for Hospital and Health Care Employees, et al. Nos. 97-7584(L), 97-7646.*

For instance, the 4th Circuit held that acquittal of a criminal defendant on one count did not bar evidence on that same count, which was then final, as evidence to prove other counts. *United States v. Woods, 484 F. 2d 127, 138 (4th Cir. 1973).*

The 11th Circuit held:

> "We do not believe that the res judicata preclusion of claims that "could have been brought" in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead, we believe that, for res judicata purposes, claims that "could have been brought" are claims in existence at the time the original complaint is filed[.]" Pleming V. Universal-Rundle Corp. 142 F. *3d 1354 (11th Cir. 1998). Quoting Manning v. City of Aubum, 953 F. 2d 1355, 1358 (11th Cir. 1992).*

See also *Los Angeles Branch NAACP v. Los Angeles United School District, 750 F. 2d 731, 739 (9th Cir. 1984), cert. denied 474 U.S. 919, 88 L. Ed 2d 256, 196 S.Ct. 247 (1985); Spiegel v. Continental Ill. National Bank, 790 F.2d 638, 644-6 (7th Cir. 1985), cert. denied 479 U.S. 987, 93 L. Ed 2d 582, 107 S.Ct.*

579 (1986) (second action not barred by claim preclusion if matters occurred after first action was filed); and *18 C. Wright, A. Miller and Cooper, Federal Practice and Procedure, §4409, at 76 (1981).* "(Most cases assume that an action need include only the portions of the claim due at the time of commencing that action)".

The Respondents had argued, "Res judicata bars claims arising from the same set of transactions or operative facts as earlier claims." (Defense Motion p. 4), citing as their primary legal authority: *Frank v. Home Depot, 481 F. Supp 2d 439, 442 (DMd. 2007),* which, in turn, quoted *Peugeot Motors of America v. Auto Distributors, 892 F. 2d 355, 359 (4th Cir. 1989). Frank* was an old standard, also held in *Keith v Aldridge, 900 F. 2d 736, 740. (4th Cir. 1990),* and has long been overruled by the 4th Circuit itself:

> "In *Keith*, we held that two causes of action are the same if "the new claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment. *Keith, 900 F. 2d at 740.* [....] We doubt that the *Keith* standard was intended to preclude claims that could not have been brought at the time the first complaint was filed[.]" *Young-Henderson v. Spartanburg Area Mental Health Ctr. et al., 945 F. 2d 770 (4th Cir. 1991).*

The 4th Circuit went on to say: "The rule that a judgment is conclusive as to every matter that might

have been litigated does not apply to new rights acquired pending the action, which might have been, but which were not, required to be litigated." *Young-Henderson, fn 3.* Since, by the 4th Circuit's ruling, rights acquired pending an action are not precluded by res judicata, rights acquired after a case is decided, as in instant case, are certainly not precluded.

Thus, Respondents' arguments are based solely on totally obsolete standards that the proponents have overruled and repudiated. Their res judicata arguments are based solely on totally false premises, and, are, therefore, totally baseless arguments.

To the extent that any of the issues or facts involved in the instant case were mentioned during the prior case, they were certainly not submitted to the District Court as independent claims, and litigated, and discussed and actually decided by the District Court. Consequently, none of the current claims is barred by res judicata.

The Panel and District Court definitely erred by ignoring the Supreme Court's instructions on this particular issue as well as all the legal precedents of the 4th Circuit and other Circuits.

VI.

The Supreme Court Holds That Res Judicata Does Not Bar Claims In A Later Suit Asserting

Legal Theories That Are Different From Those Asserted In An Earlier Suit

Fraudulent misrepresentation and breach of fiduciary duties, asserted in Counts I and II, are two new legal theories that were never asserted as claims in the first lawsuit. And, based on the holdings of the United States Supreme Court, and of many Federal Circuits, later claims asserting different legal theories from those in earlier suits are not barred by res judicata.

For instance, in *Arizona, id.*, in ruling that an Indian tribe's new claim was not precluded by res judicata, the Supreme Court held: "[M]ost notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery." *Arizona, id. 530 U.S. 392.*

Among the Circuits, the 7th Circuit held that a second case of gender discrimination, filed after a plaintiff lost her COBRA claim, was not barred by res judicata. *Herrmann v. Cencom Cable Associates, Inc, 999 F. 2d 223 (7th Cir. 1993).* And that is the situation with Counts I and II in the current case and the previous one: different theories, different focus.

Furthermore, even claims in second suit asserting legal theories that are similar to those in first suit are not barred by res judicata

The Supreme Court held that plaintiffs can bring a second claim of racial discrimination after a

District Court had dismissed their class action claim of racial discrimination. *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984), 104 S.Ct. 2794, 81 L. Ed. 2d 718.*

In rulings consistent with *Cooper,* some Circuits have held that plaintiffs can assert the same or very similar legal theories in a second case as in a first case.

For instance, the 7th Circuit held that a female former employee's second sex discrimination case in Federal Court, after losing a sex discrimination case in State Court, is not barred by res judicata. *Unger v. Consolidated Foods Corp. 657 F. 2d 909, 911 (7th Cir. 1981).* Similarly, the 5th Circuit held that plaintiffs who had lost a class action suit challenging state residency requirement to take state bar examination are not barred from bringing a more narrowly tailored challenge of the 90-day length of the same residency requirement. *Kline v. Rankin, 489 F. 2d 387 (5th Cir. 1974).*

Thus, the Panel's and District Court's rulings are in serious conflict with decisions of the Supreme Court and some Circuits, and should be OVERTURNED.

VII.

None Of The Claims In This Suit Is Precluded By Res Judicata

Based on the numerous powerful rulings of the Supreme Court discussed herein, none of the claims in Petitioner's current suit is precluded by res judicata.

Moreover, an earlier *Section 1981* suit cannot preclude a later *Section 1981* suit alleging discrimination in a different aspect of the same contract. Indeed, the statute contains an implied provision for subsequent *Section 1981* suits after an initial one. The language of the statute clearly empowers an aggrieved person to sue for discrimination in every aspect and stage of the contract. For instance, a suit for discrimination in the implementation of a contract, such as in Petitioner's previous case, cannot preclude a later suit on discriminatory dismissal, as in Petitioner's instant suit.

As demonstrated herein, the Panel's and District Court's decisions absolutely contradict every established legal precedent of the Supreme Court.

The District Court refused to comply with the clear and unequivocal instructions of the Supreme Court, especially as directed by the Court in *Arizona, id.* (A claim is not precluded by res judicata unless it has been actually decided in a previous case);

International Building Co., id. (Courts must conduct inquiries to ascertain that a claim being challenged has previously been actually decided); *Dowling, id.* (Courts must put the burden on defendants to prove that the claim has previously been actually decided).

Both lower Courts failed to even acknowledge any of the 12 or so powerful opinions of this Court that were cited to both Courts. Not only that, neither of the Courts could cite even one Supreme Court opinion to contradict any legal argument presented by Petitioner.

Further, as demonstrated herein, both lower Courts completely contradicted very many rulings of all Circuits, including the 4th Circuit itself. For instance, the lower Court had previously held: "[A defendant] bears the burden of proving that the issue whose relitigation he seeks to foreclose was "necessarily determined" in the former trial." *Ragins, id, 1194 (4th Cir. 1988), citing United States v. Head, 697 F.2d 1200, 1208-9 (4th Cir. 1982).*

More disturbing is the fact that, in *Harnett v. Billman, 800 F.2d 1308, 1314 (4th Cir. 1986),* one of the only two legal authorities cited by the District Court to support its ruling (DCt Opinion, App. 18), just 3 paragraphs away from the totally inapplicable point cited by the District Court is a 4th Circuit's ruling that completely negates the District Court's whole judgment, by holding that claims not in existence during a case, are not precluded in a subsequent case. "This principle [of res judicata]

distinguishes from this case those cases where the challenged claim did not exist at the time of the prior litigation." *Harnett, id. 1313.*

Yet, the 4th Circuit totally contradicted itself by choosing to ignore this glaring contradiction.

And still more disturbing is the fact that Respondents, having failed to meet their burden as required by this Court in *Dowling, id.,* fabricated blatant untruths, and deliberately tried to create the false impression that claims that did not even exist when the previous case was decided had somehow been adjudicated during that trial. Respondents fabricated a false timeline, by creating the false impression that Petitioner's unlawful dismissal took place before the case was decided. However, the records are crystal clear that the first case was decided in February, 2006, and Dr. Onawola's unlawful dismissal occurred about two months later, in April, 2006.

Petitioner clearly brought this attempted fraud on the Court to the 4th Circuit's attention in his Appellant's Reply to Appellees' Informal Brief, dated Dec 23, 2007. But the Panel chose to ignore it, and ruled in Respondents' favor.

VIII.

The District Court Committed Very Serious Reversible Errors

The Panel seriously erred by improperly ruling that there is no reversible error, for these reasons.

(a) As demonstrated above, the District Court refused to comply with the standards and instructions of this Court, as instructed in *Arizona, id., International Building Co., id., Dowling, id.*, etc., and, instead, relied on very wrong laws that did not fit the facts. This Court has consistently held: "It is paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo, 513 U.S. 298, 333 (1995), citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990),* where the Court also held: "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Cooter, id. 402.*

(b) The errors committed by the District Court are grave errors.

(c) The errors have affected Petitioner's important rights, including, inter alia, his right to sue and his right to obtain redress for the horrible acts committed by Respondents against him, including fabricating numerous blatant untruths, committing frauds against him, all in an effort to sabotage his Sc.D. degree thesis, as the records clearly show.

(d) The errors have certainly altered the outcome of the case to Petitioner's disadvantage, since, absent the grave errors of applying the wrong law, the District Court would certainly have come to one, and only one, conclusion: that res judicata does not preclude any of Petitioner's claims.

(e) The District Court committed reversible and grave errors, the Panel seriously erred by failing to reverse its decision, and both lower Courts' rulings should be reversed.

IX.

The 4th Circuit Panel Violated Petitioner's *14th Amendment Rights To Due Process* By Essentially Reducing The 14 Days For Filing Petition For Rehearing To 5

When Petitioner received the 4th Circuit judgment of May 5, 2008, the judges failed to indicate their names, or the reason for the affirmance of the District Court's rulings (Appendix D, App. 20). From the date of that judgment, it took Petitioner nine days, of written request and waiting, to find out those critical facts that he needed to adequately prepare his petition for rehearing (Appendix E, F, App. 21, 23).

That drastically reduced the 14 days Petitioner is entitled to, by law, to a mere 5 days. Petitioner's request for time extension was flatly refused

(Appendix F, App. 23), and his petition, FedExed on the 14th day, and delivered the following day, was refused as untimely, even though, the Court deprived him of 9 of the 14 days he is entitled to. Further, most government establishments accept documents post-marked on the due date as timely, including the IRS and the Supreme Court.

Those actions by the Panel improperly deprived Petitioner of the right to have his case heard by the en banc Court, and violate his 14th Amendment right guaranteeing due process of law, and *Federal Rules of Appellate Procedures Rules 35 and 40,* which guarantee each appellant 14 days to file a petition. It also violates what this Court described as "the deep-rooted historic tradition that everyone should have his own day in court." *Taylor v. Sturgell et al., 128 S. Ct. 2161, 2164 (2008).*

CONCLUSION

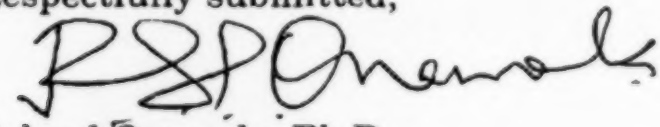
With so many irregularities and contradictions, the lower Courts' rulings on these important federal questions seriously conflict with the rulings of the Supreme Court and those of all Circuits. The Panel's actions in withholding critical information from Petitioner violate his rights to a hearing and to due process. The two lower Courts' rulings are such extreme departures "from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's supervisory power." *Rule 10(a)* sub-criterion.

Thus, the lower Courts' rulings meet the criteria of *Rules 10 (a) and (c).* Further, as the records clearly show, Respondents have relentlessly subjected Petitioner to unimaginable acts of frauds, abuse, harassment, oppression and cruelty, and should not be allowed to escape justice by hiding behind an inapplicable technicality, res judicata, that has been very improperly applied in this case.

For the foregoing reasons, I solemnly urge the Court to grant a Writ of Certiorari to review my case.

Respectfully submitted,



Roland Ọnawọla, Ph.D.
Pro se Petitioner
39 Lincoln Drive, Downingtown, PA 19335
Phone 650-255-0047, July 30, 2008

APPENDIX A

ROLAND **ONAWOLA,** Plaintiff v. JOHNS HOPKINS UNIVERSITY, et al., Defendants

Civil Action No. AMD 05-1924

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

412 F. Supp. 2d 529; 2006 U.S. Dist.

February 6, 2006, Filed

For The Johns Hopkins University, The Johns Hopkins University Board of Trustees ("JHU Trustees"), Raymond A. Mason Chair, JHU Trustees, C. Michael Armstrong Vice Chair, JHU Trustees, Ernest A. Bates Vice Chair, JHU Trustees, George L. Bunting, Jr. Vice Chair, JHU Trustees, William R. Brody Dr. President, Ray Gillian Mr., Kevin McDonald Mr., Alfred Sommer Dr., Patricia Germain Ms., Genevieve Matanoski Dr., Leon Gordis Dr., Jonathan Samet Dr., Kathy Helzlsouer Dr., George Comstock Dr., Rosa Crum Dr., Margaret Ensminger Dr., Taha Taha Dr., Francis Burman Ms., Defendants: Philip Shams Roberts, The Johns Hopkins University, Baltimore, MD.

JUDGES: ANDRE M. DAVIS, UNITED STATES DISTRICT JUDGE.

OPINION BY: ANDRE M. DAVIS

MEMORANDUM OPINION

Dr. Roland **Onawola,** acting pro se, brought this action on July 14, 2005, against Johns Hopkins University and various individuals associated with the University, including faculty members, trustees, and deans. Shortly thereafter, defendants filed an alternative motion to dismiss or for summary judgment under Fed.R.Civ.P. 12(b)(6), which I granted without prejudice, after, and for the reasons stated at length on the record during, an oral hearing. * Dr. **Onawola** then filed an amended complaint naming the University and a somewhat shorter list of its faculty as defendants.

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* Remarkably, plaintiff attached 31 exhibits to his original complaint and, while expressly incorporating by reference those 31 exhibits, he attached three more exhibits to the amended complaint. Not satisfied even with that, plaintiff also attached to the amended complaint five of the defendants' exhibits which had been attached to the defendants' original alternative motion. Accordingly, although a review of the file would suggest that this court has before it a motion for summary judgment (because plaintiff has attached sufficient exhibits to tell the story of his entire 14 year career as a student at the University), in fact the court considers only the amended complaint and the plethora of exhibits which plaintiff has incorporated by reference. *See, e.g.,* *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir.1999)(noting that exhibits are not superceded if the amended complaint effectively integrates them and stating that consideration of exhibits that were attached to the original complaint, omitted from the amended complaint, but still referred to and relied upon in the amended

Complete diversity of citizenship is present, as plaintiff is a citizen of Pennsylvania and all defendants, it appears, are citizens of Maryland. At the court's urging, plaintiff has narrowed his claims to three counts: (1) breach of contract under Maryland law; (2) race discrimination under 42 U.S.C. § 1981; and (3) retaliation under 42 U.S.C. § 1981. Now pending is the defendants' motion to dismiss the amended complaint for failure to state a claim pursuant to Rule 12(b)(6). No hearing is necessary; for the reasons stated herein, I shall grant the defendants' motion.

I.

Dr. **Onawola,** who is a native of Nigeria with a Ph.D., has been a student pursuing his Doctor of Science degree in epidemiology at the University's Bloomberg School of Public Health since the fall of 1991. At the time he commenced this action, and for some time before that, Dr. **Onawola** had satisfied all of the requirements for his degree except for completing his thesis. Although the University has a policy of allowing candidates a maximum of seven years from the date of matriculation to obtain the degree

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complaint, are properly considered on a 12(b)(6) motion)(citing with approval *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)(observing that such practice furthers the policy of "preventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting. . . . documents upon which their claims are based.")).

Dr. **Onawola** seeks, the University has repeatedly extended that deadline for Dr. **Onawola.**

The complaint alleges that, for the past 14 years, the University and its personnel have harassed Dr. **Onawola,** obstructed and "sabotaged" Dr. **Onawola's** thesis research, and otherwise subjected him to "illegal actions." Dr. **Onawola** contends that his poor treatment was the result of the University's animus toward him as a "black man of Nigerian origin."

In support of this contention, Dr. **Onawola** cites various acts and omissions of the faculty that purportedly had an adverse effect on his ability to obtain his degree. The amended complaint alleges that Dr. **Onawola** was not given a research assistantship by which he could be paid to conduct research; that Dr. Matanoski, one of the plaintiff's faculty advisors, neglected to keep appointments with him; and that generally Dr. **Onawola** failed to receive the tangible and intangible aid and assistance afforded non-black and/or non-African students. Evidently, in 1998, seven years after Dr. **Onawola's** matriculation, the University removed his name from the Epidemiology Department directory and withheld access to the "Epi Student's Room." Dr. **Onawola** also complains that a scholarship he had been awarded was reduced and eventually eliminated.

The centerpiece of Dr. **Onawola's** theory of the case seems to be a November 1, 2002, letter authored by himself and edited by his thesis advisor, Dr. Samet.

Original Complaint, Exh. 1. In the letter, Dr. **Onawola** complained that the University had delayed his progress toward his degree. Dr. **Onawola** construes Dr. Samet's edits as an adoption and admission of the substance of the letter. This suggestion is singularly without merit. Similarly, Dr. **Onawola** makes several accusations against faculty members and the University based on Dr. **Onawola's** own subjective, and highly unreasonable reactions to perceived slights. (For example, Dr. **Onawola** refers to an incident in which he confronted a faculty member, saying, "Why are you doing this to me? It's because I'm Black, isn't it?" *Amended Complaint* P 54. Dr. **Onawola** construes the faculty member's alleged response, "Just go and do as I said," to be evidence of racial animus.)

Dr. **Onawola's** primary accusation, though, is that the University and its faculty undermined his thesis research and thereby disabled him from completing his degree requirements. Dr. **Onawola** alleges that the faculty insisted on the inclusion of a mental health survey; declined to allow Dr. **Onawola** to compensate study participants using monies received through a federal grant; and failed to request a second extension of time for the grant, all of which hindered his research progress. According to Dr. **Onawola,** his faculty thesis committee required him to include in his research survey a questionnaire which, in his judgment, needlessly increased the time required to administer the full research survey, thereby reducing participation. Furthermore, in response to the substantial time commitment, Dr.

Onawola wanted to compensate research subjects, and his faculty thesis committee denied him permission to use money obtained through a grant for that purpose. Finally, and most recently, Dr. Samet, a member of Dr. **Onawola's** thesis committee and the principal investigator for his research project, declined to request a second extension of time for the grant that funded the thesis research. In sum, Dr. **Onawola** ascribes color and nationality as the reasons for all his disappointment and unhappiness in his long, unfinished trek to his degree.

II.

The standard applicable to consideration of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is well known:

A Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Furthermore, ""Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."" *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Rather, Rule 8(a)(2) requires only a ""short and plain statement of the claim showing that the pleader is entitled to relief."" Fed.R.Civ.P. 8(a)(2). *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d

321, 325-26 (4th Cir.2001). It is also important to be mindful, however, that the defendants are entitled to have the *legal sufficiency* of the complaint fully examined and that, although the truth of all facts is assumed, consistent with the complaint's allegations, *see* *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the court need not accept the legal conclusions drawn from the facts, *see* *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir.1991), or unwarranted inferences, unreasonable conclusions, or arguments. *See generally* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990 & 2004 Supp.). *Marketing Prods. Mgmt., LLC v. Healthandbeautydirect.com, Inc.*, 333 F.Supp. 2d 418, 420 (D.Md.2004).

III.

Dr. **Onawola** correctly asserts that upon his matriculation to the University, an implied contract was established. "The relationship between a student and a private university is largely contractual in nature." *Harwood v. Johns Hopkins Univ.*, 130 Md.App. 476, 483, 747 A.2d 205, 209, *cert. denied*, 360 Md. 486, 759 A.2d 231 (2000). Indeed, under this theory, courts have on rare occasions required academic institutions to confer degrees as specific performance of the implied contract. *E.g.*, *De Marco v. Univ. of Health Sci./Chicago Med. Sch.*, 40 Ill. App. 3d 474, 352 N.E.2d 356, 362 (Ill. App. Ct. 1976) (affirming order requiring that degree be awarded to

student-plaintiff). Notably, in those unusual cases where courts have seen fit to insert themselves into the academic milieu, they have universally done so where the student had essentially completed all of his academic requirements and the school's refusal to grant the degree was found to be "arbitrary and capricious." *See id.*("Plaintiff's failure to graduate was never a question of academic excellence, but was a question of whether he had complied with all the conditions which could legitimately be imposed on him after he had been dismissed for reasons extraneous to any scholastic considerations.").

At the same time, however, mindful of their lack of competence in assessing academic judgments, "courts will not generally interfere in the operations of colleges and universities." *Harwood*, 130 Md.App. at 483, 747 A.2d at 209 (internal quotation omitted); *see generally Bilut v. Northwestern University*, 269 Ill.App.3d 125, 645 N.E.2d 536, 206 Ill. Dec. 531, (Ill.App. 1994) (reversing award of specific performance and vacating injunction ordering university to afford additional time to plaintiff-student within which to earn her degree), *appeal den.*, 161 Ill.2d 523, 649 N.E.2d 413 (1995); *and see University of Pa. v. EEOC*, 493 U.S. 182, 199, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990) ("Courts have stressed the importance of avoiding second-guessing of legitimate academic judgments.")(quoted in *Urofsky v. Gilmore*, 216 F.3d 401, 434 (4th Cir. 2000)(Wilkinson, C.J., concurring), *cert. denied*, 531 U.S. 1070, 121 S. Ct. 759, 148 L. Ed. 2d 662 (2001)); *Board of Curators of the University of Missouri v.*

Horowitz, 435 U.S. 78, 92, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978) (stating that "courts are particularly ill equipped to evaluate academic performance"); *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1142 (4th Cir.1990)("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."); *cf.* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith And Fair Dealing*, 59 MD.L.REV. 183, 224 (2000) ("Courts are understandably reluctant to step into the middle of university-student disputes. They correctly note that it is inappropriate to substitute their own judgment for the institution's academic and management decisions.").

Dr. **Onawola's** claim for breach of contract takes a different tack from those in which student-plaintiffs have prevailed. As noted above, Dr. **Onawola** clearly has not completed all of the requirements for the degree he seeks. Indeed, unlike the other cases in this vein, the relief he seeks does not include compelling the University to grant him a degree. Rather, Dr. **Onawola** argues that the breach of contract came about when the University hindered him in performing his own contractual obligations, specifically, completing his thesis.

Assuming that a contract existed between Dr. **Onawola** and the University, and that the contract included a requirement of "good faith and fair dealing" on the part of the University, *see Food Fair Stores, Inc.*

v. Blumberg, 234 Md. 521, 535-36, 200 A.2d 166, 174-175 (1964); *Parker v. Columbia Bank*, 91 Md.App. 346, 604 A.2d 521, 531 (1992), as a matter of law, the University quite assuredly did not breach its contract with Dr. **Onawola.** The exhibits accompanying the plaintiff's' filings clearly evince a relationship in which the University seemingly made every reasonable accommodation for Dr. **Onawola,** above and beyond any reasonably-imagined contractual requirement. Expertise was volunteered, assistance was rendered, and deadlines were extended, all presumably for the purpose of helping Dr. **Onawola** succeed in obtaining his degree.

Many (if not all) of the events of which Dr. **Onawola** complains are academic judgments, properly left to the faculty of the University, not Dr. **Onawola,** and certainly not this court. No implied contract which might exist here could be understood to waive the University's right to maintain stringent academic standards; nothing in the record suggests that the faculty acted in an arbitrary or capricious manner toward Dr. **Onawola.**

Finally, those actions of which Dr. **Onawola** complains that are not, strictly speaking, within the domain of academic judgment, such as the University refusing him access to office space, are plainly outside the scope of any contractual agreement. To the extent that a contract existed, it was based on the reasonable expectations of the parties. Here, Dr. **Onawola** has failed to allege any facts which would give him a reasonable expectation that he was

entitled to office space or any of the other collateral benefits of which he claims to have been improperly deprived.

IV.

What is said above essentially disposes of plaintiff's claim under 42 U.S.C. § 1981, even assuming a cognizable claim of discrimination can be discerned from the four corners of the amended complaint and its multitude of exhibits. To be sure, the pleading requirement is not onerous. *See* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). However, a plaintiff is required to state facts sufficient to support a claim for relief. Dismissal is appropriate if the complaint fails to allege any facts that might support an inference that the defendant intentionally discriminated against plaintiff because of color or national origin. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir.2003)(stating that "while a plaintiff is not charged with pleading facts sufficient to prove [its] case, as an evidentiary matter, in [its] complaint, a plaintiff *is* required to allege facts that support a claim for relief") (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir.2002)).

The facts alleged in the amended complaint are insufficient to support a remedy under § 1981 for discriminatory interference with contract. As discussed above, the complaint plainly fails to allege facts showing a breach of contract. Furthermore, despite an abundance of repetitive and conclusory

statements alleging racial animus on the part of the University, Dr. **Onawola** has alleged no facts suggestive [*534] of a connection between his perceived inferior treatment and his color or national origin. "Law does not blindly ascribe to race all personal conflicts between individuals of different races." *Hawkins v. Pepsi Co, Inc.*, 203 F.3d 274, 282 (4th Cir.), *cert. denied*, 531 U.S. 875, 121 S. Ct. 181, 148 L. Ed. 2d 125 (2000).

The record plainly shows what commonsense and common experience teaches: that Dr. **Onawola's** experience at the University, while not without its setbacks, was nothing outside the usual experience of a doctoral student in a high-quality, rigorous program. Second, on those occasions that Dr. **Onawola** encountered difficulties, there was no basis to conclude that such problems were in any way related to his color or national origin.

The same is true of Dr. **Onawola's** allegation that the University retaliated against him in violation of § 1981 by failing to request a further extension of the federal grant which funded his thesis research and by reassigning and emptying the on-campus office space Dr. **Onawola** had occupied while working on the research. Among other elements, a successful retaliation claim under § 1981 requires the plaintiff to demonstrate that he was subjected to an adverse action. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001); *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003). The adverse action required to sustain a retaliation claim has

been characterized as "some impairment of the plaintiff's rights." *Saleh v. Upadhyay*, 11 Fed. Appx. 241, 255 (4th Cir. 2001) (citing *Am. Civil Liberties Union, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993)). No such adverse action has been pleaded in the amended complaint; therefore, this claim too fails, to the extent is not simply redundant of his discrimination claim.

The two actions complained of, while undoubtedly unpleasant for Dr. **Onawola,** were entirely within the discretion of the University to take and did not impair any right of Dr. **Onawola.** As mentioned above, courts are rightly hesitant to interfere in the area of academic decisions because they lack competence to resolve questions such as whether to request an extension of funding for an admittedly stalled project. Dr. **Onawola** had no right to an extension of the federal grant nor any right to compel Dr. Samet to request such an extension. Accordingly, there could be no cognizable "adverse action" in Dr. Samet's even-handed exercise of discretion. Furthermore, Dr. **Onawola** was not entitled to office space at the University merely by virtue of being a student. Therefore, the University's decision to discontinue Dr. **Onawola's** use of the office space and make his belongings available for him to retrieve from another location did not intrude on any right of Dr. **Onawola.**

In sum, as a matter of law, Dr. **Onawola** has failed to allege facts sufficient to support the conclusion that he was the victim of an adverse action (or that

any action was motivated by color or national origin) and therefore his retaliation claim must fail. More than that even, considering the mountain of exhibits accompanying the amended complaint, plaintiff has affirmatively pleaded himself out of any cause of action he might otherwise have had. *Cf.* *Bell v. Ohio State University*, 351 F.3d 240 (6th Cir. 2003) (affirming summary judgment in favor of medical school against disappointed student alleging claim under § 1981).

V.

For the foregoing reasons, the motion to dismiss shall be granted with prejudice. An order follows.

Filed: February 6, 2006

/s/ Andre M. Davis
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

APPENDIX B

DR. ROLAND **ONAWOLA,** Plaintiff - Appellant,
versus
JOHNS HOPKINS UNIVERSITY; THE JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES; DR. JONATHAN SAMET; DR. KATHY HELZLSOUER; DR. GEORGE COMSTOCK; DR. ROSA CRUM; DR. TAHA TAHA, Defendants - Appellees, and RAYMOND A. MASON, Chair, JHU Trustees; C. MICHAEL ARMSTRONG, Vice Chair, JHU Trustees; ERNEST A. BATES, Vice Chair, JHU Trustees; GEORGE L. BUNTING, JR., Vice Chair, JHU Trustees; WILLIAM R. BRODY; RAY GILLIAM; KEVIN MCDONALD; ALFRED SOMMER; PATRICIA GERMAIN; GENEVIEVE MATANOSKI; LEON GORDIS; MARGARET ENSMINGER; FRANCIS BURMAN; JOHN DOES 1 THROUGH 20, Defendants-Appellees.

No. 06-1294

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

221 Fed. Appx. 211; 2007

February 23, 2007, Submitted
March 13, 2007, Decided

COUNSEL: Roland **Onawola,** Appellant, Pro se.

Philip Shams Roberts, JOHNS HOPKINS UNIVERSITY, Baltimore, Maryland, for Appellees.

JUDGES: Before KING and SHEDD, Circuit Judges, and

HAMILTON, Senior Circuit Judge.

OPINION

PER CURIAM:

Roland **Onawola** appeals the district court's order entering judgment for Defendants in this action alleging breach of contract and discrimination. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. ***Onawola*** *v. Johns Hopkins Univ.*, 412 F. Supp. 2d 529, 2006 U.S. Dist. LEXIS 4424, No. 1:05-cv-01924-AMD (D. Md. Feb. 6, 2006). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and [**2] argument would not aid the decisional process.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ROLAND ONAWOLA,
Plaintiff
v. Civil Action No. AMD 07-870
JOHNS HOPKINS
UNIVERSITY ET AL.,
Defendants

MEMORANDUM OPINION

In case no. AMD 05-1924, the present plaintiff, Dr. Roland Onawola, acting pro se, brought an action on July 14, 2005, against Johns Hopkins University and various individuals associated with the University, including faculty members and trustees, alleging claims for (1) breach of contract under Maryland law; (2) race discrimination under *42 U.S.C. §1981*; and (3) retaliation under *42 U.S.C. §1981,* arising out of his unsuccessful quest for the degree of Doctor of Science. In a Memorandum Opinion and Order filed on February 6, 2006, the court granted defendants' motion to dismiss all claims. See *412 F. Supp. 2d 529 (D.Md. 2006).* Upon Dr. Onawola's appeal, the Fourth Circuit affirmed in an unreported per curiam opinion. See 211, 2007 WL 749653 (4th Cir. March 13, 2007).

A mere 22 days after the Fourth Circuit affirmed the dismissal of the prior suit, Dr. Onawola, again

proceeding pro se, filed the instant action. Here, with only a few minor variations in his allegations and in the identity of the named defendants, plaintiff has purported to seek the identical relief he sought in the prior action. Defendants have moved to dismiss this action on the ground of claim preclusion. Dr. Onawola has filed an opposition memorandum. No hearing is necessary.

It is perfectly clear, even in the face of plaintiff's instant complaint when judged against the pleadings and motion papers plaintiff filed in the prior action (of which the court takes official notice), plaintiff's claims are barred. See, e.g., *In re Varat Enters., Inc., 81 F.3d 1310, 1315 (4th Cir. 1996)* (claim preclusion bars a subsequent action when "1) the prior judgment was final on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding."). A plaintiff's invocation of a different legal theory in the subsequent action is unavailing. See *Harnett v. Billman, 800 F.2d 1308, 1314 (4th Cir. 1986), cert denied, 480 U.S., 932 (1987).*

To be sure, plaintiff alleges that in the instant action, he seeks redress because, at some unspecified time after the filing of the first action, the university dismissed him from the doctoral program in which he was enrolled, and therefore he could not have sued for such harm at the time. Aside from the fact that the court cannot find any such allegation in the prolix complaint plaintiff filed in this case, the prior

opinion of this court makes it clear that the law under plaintiff's "contract" with the university reserves to the university the right to dismiss him from the academic program. Plaintiff's conclusory allegation, alleging, in his opposition memorandum, that he has "acquired new rights" since he filed his first action lacks merit.

For the foregoing reasons, the motion to dismiss shall be granted with prejudice. An order follows.

Filed: September 24, 2007
/s/

ANDRE M, DAVIS
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED: May 5, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2073
(1:07-cv-00870)

ROLAND ONAWOLA,
Plaintiff - Appellant
v.
JOHNS HOPKINS UNIVERSITY; JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES; WILLIAM BRODY, President; MICHAEL KLAGG, Dean; ALFRED SOMER, Former Dean; JONATHAN SAMET, Dr.; KATHY HELZLSOUER, Dr.; GEORGE COMSTOCK, Dr.; ROSE CRUM, Dr.; TAHA TAHA, Dr.; LISA JACOBSON, Dr; FRANCES BURMAN, Dr.; GENEVIEVE MATANOSKI, DR.; JOHN DOES 1-5,
Defendants - Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2073

ROLAND ONAWOLA,
Plaintiff - Appellant
v.
JOHNS HOPKINS UNIVERSITY; JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES; WILLIAM BRODY, President; MICHAEL KLAGG, Dean; ALFRED SOMER, Former Dean; JONATHAN SAMET, Dr.; KATHY HELZLSOUER, Dr.; GEORGE COMSTOCK, Dr.; ROSE CRUM, Dr.; TAHA TAHA, Dr.; LISA JACOBSON, Dr; FRANCES BURMAN, Dr.; GENEVIEVE MATANOSKI, DR.; JOHN DOES 1-5,
Defendants - Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge.
(1:07-cv-00870)

Submitted: March 28, 2008 Decided: May 5, 2008

Before KING and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Roland Onawola, Appellant Pro Se. Philip Shams Roberts, Terri Lynn Turner, JOHNS HOPKINS UNIVERSITY, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roland Onawola appeals the district court's order dismissing this action on the basis of res judicata. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Onawola v. Johns Hopkins Univ., No. 1:07-cv-00870 (D.Md. Sept. 24, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX F

FILED: May 12, 2008
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2073
(1:07-cv-00870)

ROLAND ONAWOLA,
Plaintiff - Appellant
v.
JOHNS HOPKINS UNIVERSITY; JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES; WILLIAM BRODY, President; MICHAEL KLAGG, Dean; ALFRED SOMER, Former Dean; JONATHAN SAMET, Dr.; KATHY HELZLSOUER, Dr.; GEORGE COMSTOCK, Dr.; ROSE CRUM, Dr.; TAHA TAHA, Dr.; LISA JACOBSON, Dr; FRANCES BURMAN, Dr.; GENEVIEVE MATANOSKI, DR.; JOHN DOES 1-5,
Defendants - Appellees

ORDER

The Court denies the motion for extension of time to file appellant's petition for rehearing or rehearing en banc.

For the Court—By Direction

/s/ Patricia S. Connor, Clerk

114

Supreme Court, U.S.
FILED
NOV 12 2008
OFFICE OF THE CLERK

No. 08-401

In The
Supreme Court of the United States

DR. ROLAND ONAWOLA

Petitioner

v.

JOHNS HOPKINS UNIVERSITY, JOHNS HOPKINS UNIVERSITY BOARD OF TRUSTEES, PRESIDENT WILLIAM BRODY, DEAN MICHAEL KLAGG, FORMER DEAN ALFRED SOMERS, DR. JONATHAN SAMET, DR. KATHY HELZLSOUER, DR. GEORGE COMSTOCK, DR. ROSA CRUM, DR. GENEVIEVE MATANOSKI, DR. TAHA TAHA, DR. LISA JACOBSON, MS. FRANCES BURMAN

Respondents

On Writ Of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

ROLAND ONAWOLA, PH.D.
Pro Se Petitioner
39 Lincoln Drive
Downingtown, PA 19335
Telephone: 650-255-0047

NEW ISSUE OF RESPONDENTS WAIVING AND FORFEITING THEIR RIGHTS TO OPPOSE THE PETITION

Pursuant to Supreme Court Rule 15.8, Petitioner Dr. Roland Onawola humbly files this Supplemental Brief to address the new issue of Respondents waiving and forfeiting their rights to oppose my Petition for Writ of Certiorari.

This new issue has arisen from Respondents' failure to file a Brief in Opposition. As of November 11, 2008, that is, 13 days past the filing deadline of October 29, 2008, and after the Petition had been distributed to the Court by the Clerk, Petitioner had not received notice from Respondents that they have filed a Brief in Opposition, and the Court's Docket did not indicate that Respondents have filed the document.

I humbly submit that, by failing to raise any opposition to the Petition through a Brief in Opposition, Respondents have waived and forfeited their rights, and should henceforth be precluded from ever raising such opposition.

This suggestion is based on Supreme Court Rule 15.2, which, in relevant parts, reads: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

Further, the Court has consistently enforced Rule 15.2. For instance, in *Aetna v. Davila*, the Court held: "Respondents did not identify this possible argument in their brief in opposition to the petitions for certiorari, and we deem it waived. See this Court's Rule 15.2." *Aetna Health Inc., et al. v. Davila*, 542 U.S. 200, 212 (2004).

Similarly, in *United States v. Bean*, the Court held that a certain claim "is waived, as respondent raised it for the first time in his brief on the merit to this Court." *United States v. Bean*, 537 U.S. 71, 75 (2002).

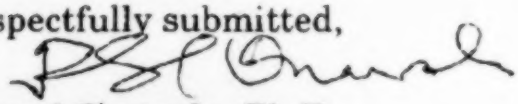
See also *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996).

Since Respondents have waived and forfeited their rights to oppose the Petition, they have, in effect, conceded all the questions, facts, issues and arguments presented in my Petition.

CONCLUSION

For the reasons presented above and in the Petition, I humbly urge the Court to rule in my favor on all questions, facts, issues and arguments presented in my Petition, and to reverse the rulings of the lower courts.

Respectfully submitted,



Roland Onawola, Ph.D.
Pro se Petitioner
39 Lincoln Drive, Downingtown, PA 19335
Phone 650-255-0047, November 11, 2008